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Constructing Modern-Day U.S. Legal Education with Rhetoric: Langdell, Ames, and the Scholar Model of the Law Professor Persona

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**CONSTRUCTING MODERN-DAY U.S. LEGAL EDUCATION WITH
RHETORIC: LANGDELL, AMES, AND THE SCHOLAR MODEL OF
THE LAW PROFESSOR PERSONA**

*Carlo A. Pedrioli**

I. INTRODUCTION.....	55
II. THE LAW PROFESSOR AND LEGAL EDUCATION FROM CONTINENTAL EUROPE TO ENGLAND TO THE UNITED STATES ...	59
III. PERSONA THEORY AND PERSONA ANALYSIS.....	65
A. Persona Theory	65
B. Persona Analysis.....	68
IV. THE LAW PROFESSOR PERSONA—SCHOLAR V. PRACTITIONER	69
A. The Law Professor As Scholar	69
B. The Law Professor As Practitioner.....	75
V. CONCLUSION.....	78

I. INTRODUCTION

Until the end of the nineteenth century, most preparation for admission to the bar in the United States had taken place outside of the university, as it had in England.¹ Prospective lawyers would work under practicing lawyers to learn the art of lawyering.² Preparation for legal practice involved reading in the law office and observing lawyers in action.³ If a student of the law were unable to

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1. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 24 (1983); Brainerd Currie, *The Materials of Law Study*, 3 J. LEGAL EDUC. 331, 342 (1951).

2. Currie, *supra* note 1, at 357.

3. Richard Davis Rieke, *Rhetorical Theory in American Legal Practice* 58 (1964)

study under the supervision of a practicing attorney, the student might read law independently.⁴ Acquisition of the art of rhetoric,⁵ if any, came from prior education, observation of lawyers in practice, or reading earlier works of oratory.⁶ This approach was very much a hands-on approach to learning what was then the trade of lawyering.

Between 1870 and 1920, a growing group of elite lawyers developed U.S. law into an academic field well established within the university,⁷ which law remains to the present day.⁸ During the same time in U.S. history, scholars were developing the social sciences into academic fields,⁹ and the university was taking root.¹⁰ As research became more important, U.S. higher education became more specialized.¹¹

At Harvard Law School in 1870, Christopher Columbus Langdell assumed the deanship and, with the support of Charles W. Eliot, Harvard's president, introduced the case method of instruction to his students, moving them away from conventional legal textbooks.¹² Instead of lecturing to students, teachers who employed the case method would ask students questions about appellate cases.¹³ Langdell adopted the belief of Sir William Blackstone, the famous eighteenth century commentator on the laws of England, that law

(unpublished Ph.D. dissertation, Ohio State University) (on file with University Library Book Depository, Ohio State University).

4. *Id.*

5. The term *rhetoric* refers to communication, which itself refers to human symbol use. SONJA K. FOSS & KAREN A. FOSS, INVITING TRANSFORMATION: PRESENTATIONAL SPEAKING FOR A CHANGING WORLD 4 (2d ed. 2003). This Article focuses on rhetoric that is persuasive in nature. See ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 36 (George A. Kennedy trans., 1991).

6. Rieke, *supra* note 3, at 58.

7. John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311, 314-15 (1985).

8. See Anthony Chase, *The Legal Scholar As Producer*, 13 NOVA L. REV. 57, 67 (1988) (noting that, because of the law school's position within the university, the law professor must engage in scholarship).

9. Schlegel, *supra* note 7, at 319.

10. LAURENCE R. VEYSEY, THE EMERGENCE OF THE AMERICAN UNIVERSITY 1-3 (1965). In the United States, the university, a creation of Western Europe, "could uniquely satisfy the social idealism, the personal ambition, and the prideful American urge to equal the best of European achievements." *Id.* at 3. The university grew out of the college. *Id.*

11. *Id.* at 142-43.

12. Schlegel, *supra* note 7, at 314; Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329, 341-42 (1979). At the same time he was supporting the introduction of the case method to Harvard Law School, Eliot was supporting reform in the undergraduate science curriculum and the medical school curriculum. The common objective was moving students away from lecture-based education. Chase, *supra*, at 342-43.

13. STEVENS, *supra* note 1, at 52.

was a science,¹⁴ an idea that had come from the civil law tradition and had dated back at least to the Middle Ages.¹⁵ Langdell insisted that law students attempt to induce scientific principles of law through careful examination of appellate cases.¹⁶ Such a process was supposed to bring order out of chaos.¹⁷ Under this Langdellian paradigm, law was a system of “unitary, self-contained, value-free, and consistent . . . principles” for students to learn.¹⁸

While the university law school began to gain control of much of the access to the legal field, the practicing bar began to lose much of its control of such access. Eventually, states began to disallow law office study as a means of admission to the bar, which opened the door to requiring law school study for admission.¹⁹ By mid-twentieth century, every jurisdiction would allow law school as a means of entry into the legal field.²⁰ Only four jurisdictions would mandate apprenticeship, and fifteen jurisdictions would not allow apprenticeship as a means of entry into the field.²¹

At the center of the new academic legal field, recently grounded within the university, was the law professor. Within the legal profession, the law professor had, and continues to have, “a profound impact on thinking about law, procedure, and institutions.”²² Today, because “[t]he American law professor is American legal education,”²³

14. Currie, *supra* note 1, at 350; Schlegel, *supra* note 7, at 314; STEVENS, *supra* note 1, at 52. Langdell offered several observations about how law was a science. For instance, in a speech at Harvard, he made the following statement:

My associates and myself, therefore, have constantly acted upon the view that law is a science, and that a well-equipped university is the true place for teaching and learning that science. Accordingly the law library has been the object of our greatest and most constant solicitude We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all what the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.

C. C. Langdell, *Teaching Law As a Science*, 21 AM. L. REV. 123, 124 (1887).

15. Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837, 838 n.3 (1990).

16. Schlegel, *supra* note 7, at 314; STEVENS, *supra* note 1, at 52.

17. Mathias Reimann, *A Career in Itself: The German Professoriate As a Model for American Legal Academia*, in THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820-1920 165, 178-79 (Mathias Reimann ed., 1993).

18. STEVENS, *supra* note 1, at 53. Langdell may have adopted this law-as-science perspective to please Eliot, who had a science background and had taught chemistry at Harvard. BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906 app. 2 at 351 (2009); Chase, *supra* note 12, at 334.

19. STEVENS, *supra* note 1, at 217 n.9. In the late 1910s, no state required law school attendance, but change was on the horizon. *Id.* at 99.

20. *Id.* at 217 n.9.

21. *Id.*

22. *Id.* at xiii.

23. Douglas D. McFarland, *Self-Images of Law Professors: Rethinking the Schism*

he or she is “both the gatekeeper[] and molder[] of the profession.”²⁴ In 1927, Felix Frankfurter, then a law professor at Harvard University and later a justice on the U.S. Supreme Court, observed, “In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them.”²⁵ Eventually, in 1921, after the Langdellian paradigm had taken hold firmly, the American Bar Association (ABA) recognized the law professor’s “claim to primacy in teaching” law.²⁶

The law professor, situated within the university, needed to have a role, or persona, suitable for the new university paradigm. The career practitioner who had supervised prospective lawyers under the apprentice system would not fit. Consequently, lawyers who supported a university-based approach to preparing prospective lawyers for entry into the field had to devise another persona for the law professor, and they did just that, employing discourse to develop a scholar persona. When other lawyers disagreed with the concept of the scholar persona, particularly regarding what it meant for the education of future lawyers, the other lawyers responded with their own discourse that supported a practitioner persona for the law professor. Through rhetoric, two groups within the legal field focused on different “values, needs, and purposes,”²⁷ and the controversy became a sign of a field in transition.

This Article explains how lawyers like Langdell and James Barr Ames, a disciple of Langdell, employed rhetoric between 1870, when Langdell assumed the deanship at Harvard Law School, and 1920, when law had emerged as a credible academic field in the United States, to construct a persona, that of a scholar, appropriate for the law professor situated within the university. To do so, the Article will contextualize the rhetoric with historical background on the law professor and legal education, draw upon rhetorical theory to give an overview of persona theory and persona analysis as a means of conducting the study, and elaborate upon both the new scholar persona that lawyers like Langdell and Ames constructed and the practitioner persona that other lawyers attempted to promote as the standard. For this study, the term *lawyers* will refer to practicing lawyers and judges as well as academic lawyers. Although rhetoric cannot resolve all conflicts, the significance of the rhetoric in this

in *Legal Education*, 35 J. LEGAL EDUC. 232, 232 (1985).

24. Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation’s Law Professors*, 25 U. MICH. J.L. REFORM 191, 193 (1991).

25. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992).

26. Schlegel, *supra* note 7, at 314, 317.

27. Paul Stob, *Chisholm v. Georgia and the Question of the Judiciary in the Early Republic*, 42 ARGUMENTATION & ADVOC. 127, 127-28 (2006).

case is hard to overstate because the scholar persona constructed after the Civil War and before the Jazz Age is the persona that, with minor modifications, continues to shape law students, and thus future lawyers, in the present day.²⁸

II. THE LAW PROFESSOR AND LEGAL EDUCATION FROM CONTINENTAL EUROPE TO ENGLAND TO THE UNITED STATES

The role of the law professor in the United States developed alongside the role of the law school. Like many U.S. phenomena, this one began in Europe. On the European continent itself before the founding of the United States, formal university education was a prerequisite for admission to the bar, although practical training was another component of admission, too.²⁹ Law teachers in Europe were academics who wrote commentaries on the civil law in an effort “to organize and systematize the law.”³⁰ To the contrary, in England, university education was not a prerequisite for admission to the bar, although many lawyers had university educations, but apprenticeship was a prerequisite.³¹ Teachers at the Inns of Court, where future lawyers learned to practice law and which date back at least as far as the thirteenth century,³² were legal practitioners.³³ Although today in the United Kingdom an academic segment of preparation for entry into the legal field generally takes place within the parameters of an undergraduate education,³⁴ this was not always the case. The bar apparently considered the Inns sufficient.

In England, civil and canon law had been taught at Oxford and Cambridge, but professorships in common law were relatively unknown before the time of Sir William Blackstone.³⁵ Beginning in a series of lectures at Oxford in 1753, Blackstone sought to move English legal education into academia,³⁶ and, although the idea did not catch on immediately, Blackstone played an important role in the development of a new English, and ultimately U.S., connection between legal education and the university.³⁷ In taking a step toward

28. See Carlo A. Pedrioli, *Professor Kingsfield in Conflict: Rhetorical Constructions of the U.S. Law Professor Persona(e)*, 38 OHIO N.U. L. REV. 701, 702, 725 (2012).

29. Currie, *supra* note 1, at 342.

30. Roscoe Pound, *The Achievement of the American Law School*, 38 DICTA 269, 269 (1961).

31. Currie, *supra* note 1, at 342.

32. Wilfrid Bovey, *The Control Exercised by the Inns of Court over Admission to the Bar in England*, 3 AM. L. SCH. REV. 334, 334 (1913).

33. Pound, *supra* note 30, at 269.

34. Michael I. Swygert, *Striving to Make Great Lawyers — Citizenship and Moral Responsibility: A Jurisprudence for Law Teaching*, 30 B.C. L. REV. 803, 806 n.9 (1989).

35. See Currie, *supra* note 1, at 346-47.

36. *Id.* at 347.

37. *Id.* at 347, 349.

his ideal, Blackstone became, in 1758, “the first professor of English law at any English University.”³⁸ Unfortunately for Blackstone, his plan for a college of law at Oxford did not materialize, and, in 1766, the professor resigned in disappointment.³⁹ Nonetheless, Blackstone set a key precedent for the university law professor within the English common law system.

In the United States, Blackstone’s borrowed idea of a nexus between legal study and the university slowly began to take hold. During the final decades of the eighteenth century, four university law professorships developed in the States, and three more such professorships were in the planning stages.⁴⁰ For example, in 1779, Thomas Jefferson created at William and Mary College the first notable professorship of law in the United States, which George Wythe assumed.⁴¹ In 1794, Columbia appointed James Kent as a professor of law.⁴² In his inaugural lecture, Kent noted the following:

A lawyer in a free country, should have all the requisites of Quintilian’s orator. He should be a person of irreproachable virtue and goodness. He should be well read in the whole circle of the arts and sciences. He should be fit for the administration of public affairs, and to govern the commonwealth by his councils, establish it by his laws, and correct it by his example.⁴³

Kent added that the lawyer should be familiar with the Greek and Roman classics, know something of civil law, be able to reason well after having studied logic and mathematics, possess a good sense of moral philosophy, and have mastered public speaking.⁴⁴ An important point from Kent’s lecture is that to be well qualified to serve society, lawyers ought to have broad educations, and one source of a broad education is the university.⁴⁵

Despite the beginnings of the development of the idea of the law professor that had come about in the United States by the end of the eighteenth century,⁴⁶ preparation for admission to the bar at that time generally took place in the apprenticeship setting,⁴⁷ but law

38. James Bradley Thayer, *The Teaching of English Law at Universities*, 9 HARV. L. REV. 169, 170 (1895).

39. *Id.* at 171.

40. Currie, *supra* note 1, at 350.

41. *Id.* at 350-51.

42. Robert S. Pasley, *The Position of the Law School in the University*, 16 CATH. U. L. REV. 34, 37 (1966).

43. James Kent, Professor of Law, Columbia Coll., An Introductory Lecture to a Course of Law Lectures (Nov. 17, 1794), in 3 COLUM. L. REV. 330, 338 (1903).

44. *Id.* at 338-40.

45. Pasley, *supra* note 42, at 37-38.

46. See Currie, *supra* note 1, at 350-51.

47. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 278-79 (1973).

schools nonetheless began to develop.⁴⁸ For instance, in 1784, the Connecticut-based Litchfield Law School, although not associated with a university, opened as an extension of practical training.⁴⁹ Judge Tapping Reeve was the founder.⁵⁰ His school grew in size and attracted students from across the country.⁵¹ The Litchfield Law School operated until 1833, ultimately having suffered from the effects of competition.⁵² In 1817, two years after establishing the inaugural Royall Professorship of Law, Harvard opened its own law school, but the school did not survive and had to close temporarily.⁵³ Various factors, including high tuition and expenses, as well as competition from both law offices and other law schools, contributed to Harvard's short-lived original operation of its law school.⁵⁴ Just before it closed, the school had four students and then only one.⁵⁵

In 1829, Joseph Story, who was sitting on the U.S. Supreme Court, assumed a professorship of law at Harvard and revived that institution's law school in part due to his "reputation as a jurist and success as a teacher."⁵⁶ In his inaugural address, Story, connecting law to other fields as Blackstone and Kent had done, noted that "law searches into and expounds the elements of morals and ethics, and the eternal law of nature, illustrated and supported by the eternal law of revelation."⁵⁷ However, to gain new students and re-establish the law school, Story moved the law school away from the policies of other college programs and allowed students without college degrees or even college eligibility to enter the law school.⁵⁸ Apparently, pragmatics had to come before ideals because the previous shortage of students had brought about the failure of the law school,⁵⁹ and one can assume that Story did not want that failure to recur. In his quest to revitalize Harvard Law School, Story was successful in attracting students from all over the country.⁶⁰

Despite an early failure, the Harvard Law School became "the first university school of law in any common law country" and, as "an academic professional school," stood in contrast to both "the purely

48. *Id.* at 279.

49. Thayer, *supra* note 38, at 171.

50. FRIEDMAN, *supra* note 47, at 279.

51. *Id.*

52. *Id.*

53. Pasley, *supra* note 42, at 38-39.

54. Currie, *supra* note 1, at 360.

55. *Id.*

56. *Id.* at 361, 362.

57. *Id.* at 362 (internal citation omitted).

58. *Id.* at 363.

59. *See id.* at 360.

60. Erwin N. Griswold, *English and American Legal Education*, 10 J. LEGAL EDUC. 429, 431 (1958).

academic law schools of Continental Europe and the purely professional legal education prevailing in England.”⁶¹ Although its program drew upon existing legal education in Europe,⁶² Harvard offered a new type of legal education that previewed the future of legal education in the United States.⁶³

As noted above, by the 1870s, lawyers like Langdell were beginning actively to develop U.S. law into an academic field within the university.⁶⁴ During this period, lawyers who supported the law school approach to legal education faced the challenge of justifying their nontraditional approach.⁶⁵ These lawyers needed to distinguish their product from the more traditional product of law office study.⁶⁶ Much as, during critical historical moments, U.S. legal minds had drawn upon British common law,⁶⁷ U.S. lawyers in the late nineteenth century could draw upon Blackstone’s borrowed idea of the nexus between legal study and the university.⁶⁸ However, lacking contemporary models of academic lawyers in Britain, the U.S. lawyers had to look to continental Europe, and particularly to Germany, “the citadel of legal learning,” for contemporary models of academic lawyers.⁶⁹ These U.S. lawyers attempted to differentiate between academic lawyers and practicing lawyers and chose to associate the former, unlike the latter, with the university, “a powerful symbol and an increasingly powerful institution” at the end of the nineteenth century and the start of the twentieth century.⁷⁰ From this perspective, the law school-educated lawyer could claim the benefit of having studied law under individuals associated with the university.⁷¹

Langdell’s approach to developing academic law and its role within the university was controversial but, in terms of influence and longevity, ultimately successful. During his first year of teaching, students came to know Langdell “as an ‘old crank,’” and the number

61. 2 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 197 (1965).

62. *See, e.g.*, Reimann, *supra* note 17, at 167.

63. CHROUST, *supra* note 61, at 197; Pasley, *supra* note 42, at 39.

64. STEVENS, *supra* note 1, at 52.

65. Schlegel, *supra* note 7, at 320.

66. *Id.* at 320-21.

67. *See* Bjørn F. Stillion Southard, *Prudential Argumentation and John Marshall’s Opinion in Marbury v. Madison* (1803), 44 *ARGUMENTATION & ADVOC.* 1, 16 (2007) (noting that Marshall’s *Marbury* decision drew upon elements of British common law).

68. *See, e.g.*, Currie, *supra* note 1, at 348.

69. Reimann, *supra* note 17, at 167. During the late nineteenth and early twentieth centuries, common law lawyers thought of German legal culture as “the leader of the civil law tradition.” *Id.* at 169. In the civil law tradition, certain lawyers had focused on scholarship and teaching since medieval times. *Id.* at 191.

70. Schlegel, *supra* note 7, at 320-21.

71. *See id.*

of students in his class fell to seven or eight.⁷² Also, some leading lawyers like Oliver Wendell Holmes, who suggested in a book review of Langdell's casebook *Selection of Cases on the Law of Contracts* that the casebook editor was mad, disagreed with Langdell's approach to teaching law.⁷³ Nonetheless, Langdell's disciples like James Barr Ames, himself a professor and later dean at Harvard Law School,⁷⁴ adopted the Langdellian approach to teaching law and helped to spread that approach throughout the world of legal education. Despite its many problems, such as virtually ignoring trial court records, document-drafting skills, and witness preparation,⁷⁵ Langdell's approach to teaching law seemed like "an intellectual Model T, a wholly complete, conceptually unified universe to put in the mind of the standard student."⁷⁶

As the nineteenth century drew to a close, university law school attendance became increasingly more important,⁷⁷ and the trend toward professionalization continued. By the early 1920s, the ABA recognized the law professor's "claim to primacy in teaching law."⁷⁸ The law school was taking over, and the law professor was a key actor in the drama.

Law professors, as members of the university, took to the production of knowledge within their newly established academic field. Traditionally, a major job of the university has been "to advance as well as transmit ordered knowledge. This is the work for which its society lets it live and gives it means."⁷⁹ Accordingly, while the law schools had the duty of training students for practice at the bar, the law schools also had to contribute to the larger university setting. One lasting outlet for legal research was the *Harvard Law Review*, established in 1887.⁸⁰ Other successful scholarly legal journals, including the *Yale Law Journal* in 1891 and the *Columbia Law Review* in 1901, followed.⁸¹ In 1896, the law school at the University of Pennsylvania acquired the already-existing *American*

72. STEVENS, *supra* note 1, at 66 n.15.

73. Schlegel, *supra* note 7, at 322 (citing Book Notice, 14 AM. L. REV. 233 (1880)).

74. Borthwick & Schau, *supra* note 24, at 191; KIMBALL, *supra* note 18, at 339. Ames had not practiced law, which caused controversy among Harvard Law School faculty members when he was hired. KIMBALL, *supra* note 18, at 171-72.

75. Pasley, *supra* note 42, at 43.

76. Schlegel, *supra* note 7, at 323.

77. SANDRA P. EPSTEIN, LAW AT BERKELEY: THE HISTORY OF BOALT HALL 27 (1997).

78. Schlegel, *supra* note 7, at 317.

79. James Willard Hurst, *Research Responsibilities of University Law Schools*, 10 J. LEGAL EDUC. 147, 147 (1957).

80. Currie, *supra* note 1, at 331.

81. STEVENS, *supra* note 1, at 128 n.34.

Law Register as that school's law review.⁸² By 1927, forty-two law journals were or had been in existence.⁸³

In associating legal education with the university, lawyers who supported the academic study of law attempted to raise standards for law school admission and legal study.⁸⁴ The raised standards included the requirements of some college education prior to law school and more time spent in the study of law.⁸⁵ For example, at Harvard Law School, students without college degrees had to pass entrance examinations that would consist of subjects such as Blackstone's *Commentaries* and Latin or French.⁸⁶ Also, the faculty at Harvard increased the program of study from under two years to two full years in 1871 and from two years to three years in 1876, although then the third year did not have to be in residence.⁸⁷ By 1899, Harvard required all three years of study to be in residence.⁸⁸ In contrast to offering the law office experience, university law schools were issuing degrees. For a long time, law schools issued the bachelor of laws degree (LL.B.), which became the traditional standard.⁸⁹ The elevated standards for university law schools precluded many immigrants and children of immigrants from attending law school at universities, which may have pleased the lawyers at the law schools that sought more "respectability."⁹⁰

The university law school was rapidly gaining a major portion of control of access to the legal field. In 1895, James Bradley Thayer observed that, in developing Blackstone's borrowed notion of university legal education, complete with law professors, the United States "transplanted an English root, and nurtured and developed it, while at home [in England] it was suffered to languish and die down."⁹¹ Thayer pointed out that "the great experiment in the University teaching of our law at Oxford" had "furnished the stimulus and the exemplar for our own early attempts at systematic legal education."⁹² In short, lawyers in the United States had taken Blackstone's borrowed idea of the university law school, which had

82. *Id.*

83. *Id.*

84. Mark Bartholomew, *Legal Separation: The Relationship Between the Law School and the Central University in the Late Nineteenth Century*, 53 J. LEGAL EDUC. 368, 388 (2003) (discussing how various elite law schools followed Harvard's lead in adopting higher standards for admission).

85. *See id.*

86. FRIEDMAN, *supra* note 47, at 530-31.

87. *Id.* at 531.

88. *Id.*

89. Jay W. Stein, *The Juris Doctor*, 15 J. LEGAL EDUC. 315, 315 (1963).

90. Bartholomew, *supra* note 84, at 388.

91. Thayer, *supra* note 38, at 170.

92. *Id.*

come from the European continent, and run with it. After the establishment of law professorships and law schools in the States, lawyers developed law as an academic field, more rigorous standards for admission to law school, and an increasingly more demanding degree that graduates would earn. The trade was evolving into a profession that stemmed from the university, and the law professor had a crucial role to play in the preparation of future lawyers. With such a connection between law and the university, lawyers needed a persona for the law professor that was appropriate for law as an academic field, not for law as a trade.

III. PERSONA THEORY AND PERSONA ANALYSIS⁹³

This section of the Article addresses the theory and methodology for the present study. More particularly, the section looks to rhetorical theory for a discussion of persona theory and persona analysis.

A. *Persona Theory*

Persona theory helps to inform the discussion of a law professor persona suitable for law as an academic field. This theory addresses the roles, or *personae*, that communicators create in discourse.⁹⁴ At least four types of personae can be present in discourse, including the first, second, third, and fourth personae.⁹⁵ However, given the focus of this Article on the first persona of the law professor, this subsection will concentrate on the first persona. The second, third, and fourth personae, which deal with audiences, will not receive attention here.

The first persona is “the constructed speaker/writer or ‘I’ of discourse.”⁹⁶ Such a persona is “the created personality put forth in the act of communicating”⁹⁷ and allows the communicator to identify with the audience.⁹⁸ In literature, the first persona is the speaker or

93. A previous version of this discussion of persona theory and persona analysis appeared in Pedrioli, *supra* note 28, at 704-10. The author of that article has retained copyright to the article.

94. Paaige K. Turner & Patricia Ryden, *How George Bush Silenced Anita Hill: A Derridian View of the Third Persona in Public Argument*, 37 ARGUMENTATION & ADVOC. 86, 88 (2000).

95. *Id.*; Edwin Black, *The Second Persona*, 56 Q. J. SPEECH 109, 112 (1970); Philip Wander, *The Third Persona: An Ideological Turn in Rhetorical Theory*, 35 CENT. STATES SPEECH J. 197, 209 (1984); Charles E. Morris, *Pink Herring & the Fourth Persona: J. Edgar Hoover’s Sex Crime Panic*, 88 Q. J. SPEECH 228, 230 (2002).

96. Turner & Ryden, *supra* note 94, at 88.

97. Paul Newell Campbell, *The Personae of Scientific Discourse*, 61 Q. J. SPEECH 391, 394 (1975) (emphasis omitted) (quoting WALKER GIBSON, *PERSONA: A STYLE STUDY FOR READERS AND WRITERS* xi (1969)).

98. Walter G. Kirkpatrick, *Bolingbroke and the Opposition to Sir Robert Walpole: The Role of a Fictitious Persona in Creating an Audience*, 32 CENT. STATES SPEECH J.

character a writer creates in the course of crafting writing like poetry or fiction.⁹⁹ In a way, a first persona is a mask that the communicator chooses to wear as he or she performs rhetorically, and because the persona at issue is a mask, the persona is not necessarily the communicator himself or herself.¹⁰⁰

Critics have observed that communicators have adopted various first personae. For instance, in 1916, Marcus Garvey, the then-unknown leader of the new Universal Negro Improvement Association, faced the problem of leading members of an outsider racial group against social injustice.¹⁰¹ In part, Garvey met the challenge by assuming a Black Moses persona.¹⁰² Specifically, in his rhetoric, Garvey relied upon subjects like election, captivity, and liberation, calling to mind Moses and the Jewish experiences from the Old Testament.¹⁰³ While Garvey was not actually Moses, he did assume the Moses persona. A more recent communicator who adopted the Moses persona, among other personae, was Louis Farrakhan. In his Million Man March speech, which he delivered on October 16, 1995, in Washington, D.C., Farrakhan attempted to enhance his credibility, or *ethos*, which had suffered due to Farrakhan's prior inflammatory racial discourse, by assuming a prophetic persona, specifically that of Moses.¹⁰⁴ In a related example, Martin Luther King, Jr., assumed in his discourse against civil rights violations the general persona of a prophet, although despite his skillful performance King was not necessarily an actual prophet.¹⁰⁵

Communicators sometimes perform multidimensional first personae. In the Gospel of St. Matthew, Christ performed a persona that included several roles: human being, teacher, and ruler.¹⁰⁶ Reconciliation of these competing roles within this persona came with Christ's resurrection near the end of St. Matthew's account.¹⁰⁷

12, 12 (1981).

99. See Emory B. Elliott, *Persona and Parody in Donne's The Anniversaries*, 58 Q. J. SPEECH 48, 49 (1972); see also Campbell, *supra* note 97, at 391 (observing that "[t]he term is used to mean the imaginary, the fictive being implied by and embedded in a literary or dramatic work").

100. See Thomas O. Sloan, *The Persona As Rhetor: An Interpretation of Donne's Satyre III*, 51 Q. J. SPEECH 14, 26 (1965) (noting that, for example, one should "not confuse the *persona* with [the poet]").

101. B. L. Ware & Wil A. Linkugel, *The Rhetorical Persona: Marcus Garvey As Black Moses*, 49 COMM. MONOGRAPHS 50, 52-53 (1982).

102. *Id.* at 61.

103. *Id.* at 56-61.

104. John L. Pauley, *Reshaping Public Persona and the Prophetic Ethos: Louis Farrakhan at the Million Man March*, 62 W. J. COMM. 512, 512-14, 522-23 (1998).

105. Campbell, *supra* note 97, at 394.

106. Craig R. Smith, *The Persona of Jesus in the Gospel According to St. Matthew*, 14 J. COMM. & RELIGION 57, 59-63 (1991).

107. *Id.* at 65.

In his famous pamphlet *Common Sense*, Thomas Paine constructed a persona complete with an inherent tension between a self-revealing individual and an impersonal individual.¹⁰⁸ Paine's persona provided much intimate detail about a private life but revealed little information about a public life.¹⁰⁹ This approach allowed Paine to assume a common individual persona, complete with the capacity to reason but devoid of "birth, station, and office," and to develop a special type of charisma.¹¹⁰ Much more recently, in the years after her role in the Clinton Administration's quest for national health care but before she announced that she would run for one of New York's seats in the U.S. Senate, Hillary Rodham Clinton performed a persona that was traditionally "feminine" and family-oriented as well as policy-oriented.¹¹¹ This multidimensional persona helped to make Rodham Clinton a more appealing, and thus viable, candidate for the Senate seat that she ultimately won.¹¹²

The existing corpus of research on first personae has focused predominantly on the performance of personae communicators select.¹¹³ Although some communicators might create their own first personae,¹¹⁴ many communicators employ first personae already in existence, such as Marcus Garvey and Martin Luther King, Jr., did. In the cases of Garvey and King, respectively, the chosen personae were Moses specifically and a prophet more generally.¹¹⁵ Because the scholarly interest has tended to be what communicators do with the assumed personae, scholars often have ignored much or all of the process of the creation of rhetorical personae.

Along this line, scholars who have focused on performance of first personae have not explored in depth situations in which communicators create in their discourse first personae for future use. While in certain cases the two concepts of construction and performance of first personae can function together, distinguishing

108. J. Michael Hogan & Glen Williams, *Republican Charisma and the American Revolution: The Textual Persona of Thomas Paine's Common Sense*, 86 Q. J. SPEECH 1, 13 (2000).

109. *Id.*

110. *Id.*

111. Karrin Vasby Anderson, *Hillary Rodham Clinton As "Madonna": The Role of Metaphor and Oxymoron in Image Restoration*, 25 WOMEN'S STUD. COMM. 1, 19 (2002).

112. *Id.*

113. See, e.g., Ware & Linkugel, *supra* note 101, at 56-61; Campbell, *supra* note 97, at 394; Pauley, *supra* note 104, at 522-23; Phyllis M. Japp, *Esther or Isaiah?: The Abolitionist-Feminist Rhetoric of Angelina Grimké*, 71 Q. J. SPEECH 335, 337, 339-43 (1985); Smith, *supra* note 106, at 59-63; Laura Severin, *Becoming and Unbecoming: Stevie Smith As Performer*, 18 TEXT & PERFORMANCE Q. 22, 32 (1998); Anderson, *supra* note 111, at 19; and Nneka Ifeoma Ofulue, *President Clinton and the White House Prayer Breakfast*, 25 J. COMM. & RELIGION 49, 56-61 (2002).

114. Kirkpatrick, *supra* note 98, at 22.

115. Ware & Linkugel, *supra* note 101, at 61; Campbell, *supra* note 97, at 394.

between two major types of first personae is necessary. On one hand, a communicator can select and assume a persona in his or her communication. This process is one of performance, so this type of persona is a *first persona performed* (FPP). On the other hand, a communicator might create a persona, which the communicator himself or herself or a different communicator might employ in subsequent discourse. This process is one of construction of a discursive tool for later implementation, so this type of first persona is a *first persona constructed* (FPC).

B. *Persona Analysis*

Some scholars have labeled the methodology for doing a persona theory study *persona analysis*.¹¹⁶ At least two types of persona analysis are possible. One type of analysis is *first persona performed* (FPP), which considers roles that communicators perform in discourse, while the other type of analysis is *first persona constructed* (FPC), which considers the rhetorical construction of roles that communicators can perform in the future. Although FPP has been the traditional approach taken in rhetorical studies, FPC, which this Article seeks to develop, is more appropriate for this study because the present study focuses on creation, not performance, of roles.

The present FPC study involves identification of the various traits of the law professor for which, between 1870 and 1920, lawyers argued in their writings and organization of such traits into categories of personae. For instance, such traits include participating in full-time teaching and research, as well as having extensive practical experience in lawyering. These traits may be more scholarly or more pragmatic in nature. When considered together, the particular characteristics within artifacts offer an outline of the law professor persona that communicators have put forth. Unlike an FPP analysis, an FPC analysis may not give the critic the opportunity to rely upon various precedents for the study of the persona because the persona is often new.

Research for this Article did not locate any examples of FPC studies. As noted above, critics have focused their energies on studying the FPP. Nonetheless, rhetorical personae have to come from somewhere, so at some point in time their construction must have taken place. Accordingly, FPC studies are appropriate, and this Article offers such a study.

The texts for this current research come from a search of HeinOnline. This electronic database contains law review articles that date back to the nineteenth century. For example, the database contains the first issue of the *American Law Register*, which debuted in 1852 and later became the *University of Pennsylvania Law*

116. Smith, *supra* note 106, at 64; Turner & Ryden, *supra* note 94, at 90.

Review.¹¹⁷ Although HeinOnline does not necessarily contain all law reviews, the database does contain hundreds of law reviews, including law reviews at some of the most influential law schools. A critical advantage of the database is that, unlike databases such as Westlaw and LexisNexis, HeinOnline contains numerous articles from the late nineteenth century and early twentieth century, which is essential for a study focused on the era from 1870 to 1920. Hence, because it dates back so far, HeinOnline proved to be an appropriate database for this particular study.

The search in HeinOnline identified any law review article that contained the terms *law* and *professor* in the title. Many such articles, although not all, would be likely to address the subject of this current study, but these articles would not necessarily provide a comprehensive listing of relevant articles since the discourse may have appeared in articles that did not focus exclusively on the law professor. To increase the number of appropriate articles identified, the search included locating relevant articles cited in the footnotes of the articles that resulted from the HeinOnline search. Accordingly, while the texts located for this study are by no means all of those relevant to the topic, they are both broad in their historical origins and not necessarily limited to articles that focused exclusively on the law professor.

IV. THE LAW PROFESSOR PERSONA—SCHOLAR V. PRACTITIONER

Applying persona theory to the texts identified for the study, this section of the Article examines the two main personae that lawyers put forth in their rhetoric between 1870 and 1920. The discussion focuses on the persona of the law professor as scholar and the persona of the law professor as practitioner.¹¹⁸

A. *The Law Professor As Scholar*

As noted above, by the end of the nineteenth century, the university law school was rapidly gaining control of a major portion of access to the legal field. Beginning in the 1870s, various key players at Harvard Law School and other elite law schools energetically began to promote a new persona for the law professor.

117. 1 AM. L. REG. (1852); STEVENS, *supra* note 1, at 128 n.34.

118. The idea of the persona of the law professor as a scholar/practitioner hybrid also emerged in the rhetoric, but this hybrid concept did not play a major part in shaping the rhetoric. For the hybrid perspectives of two lawyers, compare Albert M. Kales, Discussion, *The Ultimate Function of the Teacher of Law*, 3 AM. L. SCH. REV. 9 (1911), and Albert M. Kales, *Should the Law Teacher Practice Law?*, 25 HARV. L. REV. 253 (1912), with Harlan F. Stone, *The Function of the American University Law School*, 3 AM. L. SCH. REV. 11 (1911), and Harlan F. Stone, *The Importance of Actual Experience at the Bar As a Preparation for Teaching Law*, 3 AM. L. SCH. REV. 205 (1912).

James Barr Ames of Harvard maintained in 1900 that the law professorship would be “a new career in the legal profession.”¹¹⁹ William R. Vance, professor at Yale Law School, referred to this persona as that which “the new class of lawyers just emerging into group consciousness” would adopt.¹²⁰ As is possible with personae,¹²¹ this law professor persona involved multiple dimensions, including (1) an almost exclusive professional commitment, (2) teaching duties, (3) the production of research, and (4) a public function. The ensuing discussion examines the arguments that fleshed out this persona.

First, pro-scholar advocates argued that the law professor should devote almost all professional time to the university.¹²² Ames commented that “[t]he work of a law professor is strenuous enough to tax the energies of the most vigorous and demands an undivided allegiance.”¹²³ To support his vision for this dimension of the law professor persona, Ames observed that at various law schools like those of Harvard, Columbia, Virginia, Washington and Lee, Cornell, and Stanford, a professional devotion had become the norm for law professors.¹²⁴ Vance agreed with Ames.¹²⁵ Noting that law belonged in the university setting and adding that a “studious faculty” should guide the study of law, James Bradley Thayer offered essentially the same position on this point that the law professor should devote a career to the university.¹²⁶ Professors should “give, substantially, their whole time and strength to the work,” Thayer urged.¹²⁷

In advancing this argument and also in part refuting the claim that opponents of the scholar model made regarding the need for practical experience, another Thayer, Ezra Ripley Thayer of Harvard, explained what might happen if a law professor had substantial duties outside of the university.¹²⁸ If a law professor had to practice law, the uncertainties of legal practice, especially the timing of trials, could conflict with the law professor’s teaching.¹²⁹

119. James Barr Ames, *The Vocation of the Law Professor*, 48 AM. L. REG. 129, 136 (1900). Having studied law in Germany in 1869 and 1870, Ames was familiar with Germany’s well-established model of the academic lawyer. Reimann, *supra* note 17, at 173-74. Ames greatly respected the German tradition of academic law and brought home some of its ideas. *Id.* at 174-75.

120. William R. Vance, *The Ultimate Function of the Teacher of Law*, 3 AM. L. SCH. REV. 2, 7 (1911).

121. Smith, *supra* note 106, at 59-63.

122. Ames, *supra* note 119, at 137.

123. *Id.*

124. *Id.*

125. Vance, *supra* note 120, at 4.

126. Thayer, *supra* note 38, at 173.

127. *Id.* at 183.

128. Ezra Ripley Thayer, Note, *Should the Law Teacher Practice Law?*, 25 HARV. L. REV. 269, 269 (1912).

129. *Id.*

Indeed, “the impossibility of combining a trial practice with proper teaching” was a problem.¹³⁰ Ezra Ripley Thayer suggested that if the number of treatises law professors had produced had declined by the early 1910s, the decline was due to the lack of time for production of such research.¹³¹ In short, law professors were not to spend much time, if any, in the practice of law; rather, the university deserved their almost undivided attention.

Second, advocates of the scholar persona argued that the law professor persona should include a teaching dimension.¹³² The law professor who had mastered an area of the law had to find ways to teach that area of law to law students.¹³³ Ames endorsed the Langdellian inductive method of legal studies, by which students would ascertain legal principles from cases and discern where the law on a given matter stood.¹³⁴ The professor would lead classroom discussion on a subject, and ideally the discussion would continue outside of the classroom so that the students would have vigorously engaged the course materials.¹³⁵ H. B. Hutchins of the University of Michigan also noted the importance of teaching as one dimension in the law professor persona,¹³⁶ as did Felix Frankfurter of Harvard.¹³⁷ Suggesting that the law professor had to place “before his students and make[] beautiful to their eyes those great principles of right and justice that either do underlie, or should underlie, all of our rules of law,” Vance went so far as to compare a law professor’s teaching in the classroom to the teaching of Christ in the New Testament.¹³⁸

On this note, professors had to devote a substantial amount of time to teaching.¹³⁹ James Bradley Thayer observed, “[W]hen the work is fitly performed, [it] calls for an amount of time, thought and attention bestowed on the personal side of a man’s relation to his students which instructors now can seldom give.”¹⁴⁰ Ezra Ripley Thayer added, “The mere preparation for [the law professor’s] class-room work will itself be a large matter.”¹⁴¹ From this perspective, the

130. *Id.*

131. *Id.* at 272-73.

132. Ames, *supra* note 119, at 138.

133. *Id.*

134. *Id.* at 139.

135. *Id.* at 140.

136. H. B. Hutchins, *The Law Teacher: His Functions and Responsibilities*, 8 COLUM. L. REV. 362, 371 (1908).

137. See Felix Frankfurter, *The Law and the Law Schools*, 1 A.B.A. J. 532, 539 (1915) (stating that law professors contribute to the field not only by creating treatises, but also through “their class-room work”).

138. Vance, *supra* note 120, at 7-8.

139. Thayer, *supra* note 38, at 183.

140. *Id.*

141. Thayer, *supra* note 128, at 271.

law professor would need to spend time considering how to make sense out of what the professor's own law professors had taught the professor.¹⁴² Once the law professor had formulated a personal understanding of the law, the professor would discuss that understanding with students not only in class but also outside of class.¹⁴³

While some experience with legal practice might be helpful, such experience was not the main, or even a key, feature behind the teaching dimension of the law professor persona.¹⁴⁴ Indeed, the practitioner was the law professor of the past. Under the old regime, the law professor might have been someone who was "a lawyer in full practice and a teacher only as his professional engagements [would] permit" or perhaps "a judge upon the bench and a teacher incidentally."¹⁴⁵ However, the law professor of the present was "a lawyer withdrawn from practice and its emoluments"¹⁴⁶ who had learned law "by scholarly research."¹⁴⁷ Langdell argued the following about the new law professor, in part refuting the claim that opponents of the scholar persona made about the need for practical experience:

What qualifies a person . . . to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in using law, but experience in learning law, not the experience of the Roman advocate, or of the Roman praetor, still less of the Roman procurator, but the experience of the Roman jurisconsult.¹⁴⁸

Indeed, for Langdell and the lawyers who supported his position, a law professor was one who was more familiar with the path of studying law than the path of practicing law. As unorthodox as this view was in the United States at the time, the new law professor persona was not oriented toward having a dimension of legal practice.¹⁴⁹

Third, advocates of the scholar persona argued that the law professor persona also should have a research dimension.¹⁵⁰ Calling upon the European tradition of legal education, Ames asserted that in Germany "we find a large body of legal literature, of a high

142. *Id.*

143. *Id.*

144. *See* Hutchins, *supra* note 136, at 368.

145. *Id.* at 362.

146. Vance, *supra* note 120, at 5.

147. Dudley O. McGovney, Discussion, *The Function of the American University Law School*, 3 AM. L. SCH. REV. 17, 19 (1911).

148. Langdell, *supra* note 14, at 124.

149. McGovney, *supra* note 147, at 18.

150. *See* Ames, *supra* note 119, at 141.

quality, the best and the greater part of which is the work of professors.”¹⁵¹ Identifying several law professors as “the lights of the legal profession in Germany,” Ames noted, “The influence of their opinions in the courts is as great or even greater than that of judicial precedents.”¹⁵² Ames lamented his perception that the legal literature of the United States lagged behind that of Europe, and he desired that law professors in the United States begin to develop “treatises on all the important branches of the law, exhibiting the historical development of the subject and containing sound conclusions based upon scientific analysis.”¹⁵³ The advantage of the treatises was that the judge, who was not an expert in all areas of the law, would “have the benefit of the conclusions of specialists or professors.”¹⁵⁴

Other lawyers besides Ames argued for the importance of the production of research as a dimension of the law professor persona. For instance, James Bradley Thayer justified the research dimension of the law professor persona by claiming that law professors had “much formidable labor [to do] in exploring the history and chronological development of our law in all its parts.”¹⁵⁵ Also, Hutchins viewed scholarship as “[a] first requisite of effective law teaching,”¹⁵⁶ a requisite that would inform one’s teaching. By the term *scholarship*, Hutchins did not mean “the scholarship of the practitioner who investigates from time to time parts of subjects to meet immediate professional demands”; instead, Hutchins referred to “the scholarship that comes from scientific and systematic study in a rather limited field of our jurisprudence.”¹⁵⁷ An important point here was that the law professor’s research would point out “not only what the law within a given field has been and is, but also what it should be.”¹⁵⁸ Vance cited examples of research on the law such as John Henry Wigmore’s work in the area of evidence and John Chipman Gray’s work on the rule against perpetuities.¹⁵⁹ Hutchins maintained that the ideal law professor persona of the future would be a persona free from distractions from “the field of research and legal authorship.”¹⁶⁰

Such research that was an important part of the new law professor persona would be specialized in nature. The law professor,

151. *Id.*

152. *Id.*

153. *Id.* at 141-42.

154. *Id.* at 143.

155. Thayer, *supra* note 38, at 183.

156. Hutchins, *supra* note 136, at 368.

157. *Id.*

158. *Id.* at 370.

159. Vance, *supra* note 120, at 8.

160. *See* Hutchins, *supra* note 136, at 371.

Hutchins argued, should not have “to become a master of half a dozen disconnected subjects in the law and to speak and write in regard to them with authority.”¹⁶¹ Rather, the law professor was to become an expert in one, two, or perhaps three areas of the law and to publish in these areas.¹⁶² Accordingly, the law professor with one or more specialties might produce “treatises of the highest class.”¹⁶³

Fourth, and on a note related to research, pro-scholar lawyers argued that the law professor persona should include a public function dimension.¹⁶⁴ This public function could play out in several ways. For instance, as suggested above, the law professor could conduct research that would benefit the judiciary.¹⁶⁵ Also, the law professor’s research could provide criticism of new legislation.¹⁶⁶ Further, the law professor might participate in the drafting of new legislation, perhaps joining judges and practicing lawyers in the preparation of such legislation.¹⁶⁷ One example of this might be the re-drafting of criminal statutes.¹⁶⁸

Beyond these tasks, such a public function included advancing the standards for admission to study law.¹⁶⁹ These standards might include an increased number of years of preparation for the study of law. Noting, in 1908, that four years of high school were the general requirement for law school admission, Hutchins predicted that more schools would adopt the requirement of a year of college work, which some law schools already required, and that, in the future, multiple years of college work could become the prerequisite for law school admission.¹⁷⁰ Regardless of the particulars, the law professor would be the one to work on standards, especially because the law professor was aware of the needs of the students who were already studying law.¹⁷¹

From a pragmatic perspective, Frankfurter explained why the law professor persona should include a public function dimension. Frankfurter noted that unlike the members of the judiciary and the practicing bar, who were “overworked,” law professors, who were “free . . . from the absorption of practice,” could turn their time to developing the law.¹⁷² Operating under the law-as-science paradigm,

161. *Id.* at 368.

162. *Id.* at 369.

163. Thayer, *supra* note 128, at 270.

164. Hutchins, *supra* note 136, at 371.

165. *See* Ames, *supra* note 119, at 141.

166. *See id.* at 145.

167. *See id.*

168. Vance, *supra* note 120, at 8.

169. Hutchins, *supra* note 136, at 371.

170. *Id.* at 372.

171. *Id.*

172. Frankfurter, *supra* note 137, at 537-38.

Frankfurter suggested that law professors might develop legal hypotheses that practicing lawyers and judges would test.¹⁷³ Frankfurter used Joseph Story's work on developing a restatement of the English common law as an example to further this particular point.¹⁷⁴ In this manner, Frankfurter refuted the pro-practitioners' call for the law professor to practice and teach simultaneously.

As just laid out, the scholar version of the law professor persona included four major dimensions for which lawyers offered support: an almost exclusive professional commitment, teaching duties, the production of research, and a public function. Although this persona consisted of several dimensions, these dimensions came together to form one unified scholar persona. In the United States, then, this was the new professor-as-scholar persona that lawyers at Harvard and various other elite law schools constructed and disseminated through their rhetoric.

B. The Law Professor As Practitioner

Commentary has observed that "law is a dualistic, adversarial system."¹⁷⁵ While lawyers like Langdell and Ames were attempting to construct the law professor persona as scholarly in nature, other lawyers were trying to resist such rhetoric by presenting the law professor persona as more practical in nature. This latter understanding of the law professor was more traditional in the United States than the understanding of lawyers like Langdell and Ames, but, in light of the pro-scholars' spirited advocacy, the latter position required vigorous advancement. In presenting their ideal persona, pro-practitioner lawyers argued (1) that law was a practical subject that called for practical training and (2) that only an individual with practical background was well-suited for assuming the law professor persona. The ensuing discussion examines the arguments that fleshed out this persona.

First, as noted, lawyers who supported the practitioner persona for the law professor argued that law was a practical subject that called for practical training. For example, Paul L. Martin, dean of the Creighton University Law School, argued that a lawyer's academic training alone was insufficient because it would "fail to fit the law graduate for that immediate service which he aspires to render."¹⁷⁶ Instead, "a sufficient training in practice" was vital.¹⁷⁷ Relying upon an analogy with medical education, Martin pointed out that medical

173. *Id.* at 538.

174. *Id.*

175. Catherine L. Langford, *Appealing to the Brooding Spirit of the Law: Good and Evil in Landmark Judicial Dissents*, 44 *ARGUMENTATION & ADVOC.* 119, 119 (2008).

176. Paul L. Martin, *Practical Legal Education*, 3 *AM. L. SCH. REV.* 237, 237 (1913).

177. *Id.*

students would spend the majority of their last two years of medical school in hospitals and clinics in which the students would “learn to apply practically what they ha[d] gleaned from the books.”¹⁷⁸ Martin extended the significance of this analogy by noting that dental, pharmacy, and engineering students also had practical components to their respective educations.¹⁷⁹ Claiming that law schools could give law students “more than mere theory,” Philip T. Van Zile, dean of the Detroit College of Law, agreed that law students should gain substantial practical experience.¹⁸⁰ Van Zile maintained that law schools could not pay too much attention to the teaching of legal practice because the idea was to give law students as much experience as possible, not only in the realm of litigation, but also in other branches of practice.¹⁸¹

David Werner Amram of the University of Pennsylvania, who concurred with the positions of lawyers like Martin and Van Zile, further argued for the importance of practical subjects.¹⁸² To help justify more practical work in U.S. law schools, Amram cited the experiences of the legal fields in other countries.¹⁸³ For instance, law graduates in Germany had three years of apprenticeship before practicing law, including one year in public administration, one and one-half years in lower court practice, and one-half year in higher court practice.¹⁸⁴ Law graduates in Canada had to spend several years as clerks in solicitors’ offices.¹⁸⁵ While the German and Canadian systems were not perfect, the U.S. system comparatively lagged behind in preparing lawyers to practice.¹⁸⁶ Amram proposed that the following practical subjects appear in the curricula at U.S. law schools: practice and procedure, preparation of litigation papers, inspection of courts, preparation of non-contentious papers, law office management, use of the law library, and brief preparation.¹⁸⁷ Thinking that students would learn trial practice more effectively in actual courts, Amram left that area off his list of recommended practical subjects.¹⁸⁸

While lawyers were the principal participants in this conflict,

178. *Id.* at 238.

179. *Id.*

180. Philip T. Van Zile, *Practice Work in the Law Colleges*, 2 AM. L. SCH. REV. 71, 73 (1907).

181. *Id.* at 74.

182. David Werner Amram, *Law School Instruction in Practice*, 3 AM. L. SCH. REV. 439, 439-41 (1914).

183. *Id.* at 440-41.

184. *Id.* at 440.

185. *Id.*

186. *See id.* at 440-41.

187. *Id.* at 441-44.

188. *Id.* at 446-49.

they were not the only participants. For example, Walter K. Towers, a law student at the University of Michigan, joined the cause for the practitioner model.¹⁸⁹ Towers conveyed the story of a colleague “who finished a year’s study of the law with excellent marks, yet did not know what ‘34 Michigan, 254,’ meant.”¹⁹⁰ Towers pointed out that because law students often entered a new and unfamiliar world when they commenced studying law, one should refrain from assuming “that the ordinary law student has, or can secure for himself, any practical details that are not taught as part of or involved in the regular school work.”¹⁹¹

Second, as the above rhetoric would suggest, individuals who adopted this practice-oriented position argued that only an individual with practical background was well-suited for assuming the law professor persona. J. Newton Fiero, dean of the Albany Law School, argued that only the practitioner had “a true perspective” on the various topics at law school and that the practitioner’s illustrations from actual practice would impress the student.¹⁹² As Van Zile noted, law professors “should be something more than school teachers.”¹⁹³ Instead, law professors ought to be the following:

[M]en who have had practice in the profession, in the law office, and in the courts; men of experience in all the work of the profession, as well as men of learning, who are able to teach the law and apply it, who are not confined to books alone, but who can draw from the wellsprings of legal lore gathered from an actual and successful practice.¹⁹⁴

The law professor, then, was a legal practitioner.

Pro-practitioner lawyers argued that a law professor who assumed a scholar persona was not well equipped for the job. Refuting the rhetoric of the advocates of the scholar model, Fiero argued that a law professor who took up the persona of a scholar without practical experience was very much like an individual who took up the persona of an engineer and then attempted to offer an explanation “of the functions and possibilities of a steam engine, without instruction as to the method of its operation.”¹⁹⁵ Fiero extended the analogy in this way:

It would scarcely be deemed wise to place in charge of a passenger train a locomotive engineer whose knowledge of his engine was

189. See Walter K. Towers, *A Student’s Opinion of Practical Law School Instruction*, 2 AM. L. SCH. REV. 556, 556 (1911).

190. *Id.* at 557.

191. *Id.* at 556.

192. J. Newton Fiero, *Teaching Law Without Experience at the Bar*, 3 AM. L. SCH. REV. 558, 559 (1914).

193. Van Zile, *supra* note 180, at 74.

194. *Id.*

195. Fiero, *supra* note 192, at 559.

derived solely from books explaining its construction, and who had no instruction as to which lever should be used in going ahead, and which one for stopping or backing his train.¹⁹⁶

In short, lack of practical experience at the bar was a serious handicap for law professors.¹⁹⁷

In advancing his position, Fiero responded to the pro-scholar position of Langdell, Ames, and others. Fiero maintained that his rhetorical opponents had “overlooked the fact that there were able lawyers in the days before law schools, when the only place for study was in the office of the practicing lawyer.”¹⁹⁸ By calling on a more traditional approach to learning law, Fiero attempted to deny the need for the new Harvard approach.

Thus, despite the rhetoric designed to construct the law professor persona as one of a scholar, vigorous opposing rhetoric appeared in an effort to present the law professor persona differently. Some lawyers simply did not accept the scholar persona and made their case for the practitioner persona, arguing that law was a practical subject that called for practical training and that only an individual with practical background was well-suited for assuming the law professor persona.

V. CONCLUSION

In 1921, the ABA’s Section of Legal Education and Admissions to the Bar recommended, and the ABA then accepted, that every candidate for bar admission should have graduated from a law school that had the following standards: two years of college as a prerequisite, three years for full-time law study or longer for part-time law study, an adequate library available for law students, and a large enough number of faculty members who would devote their full attention to the law school.¹⁹⁹ The ABA’s focus on academic standards made it clear that the scholar model of the law professor had prevailed.²⁰⁰ Indeed, for at least the previous two decades, the scholar model of the law professor had been spreading from Harvard to other major universities.²⁰¹

The rhetoric regarding the law professor persona was one aspect of the larger conflict between 1870 and 1920 over whether law was a profession, frequently described at the time as a type of science,²⁰² or

196. *Id.*

197. *Id.* at 560.

198. *Id.* at 559.

199. A.B.A., *Conference on Legal Education*, 7 A.B.A. J., 637, 637-38 (1921).

200. *See* Schlegel, *supra* note 7, at 317.

201. *See* KIMBALL, *supra* note 18, at 192.

202. *See* Langdell, *supra* note 14, at 124. Since the Harvard lawyers and their allies viewed law as a science, which was professional in nature, the law professor persona they constructed would need to be some sort of a professional. *See* H. S. Richards,

a trade. In a report for 1913, the Carnegie Foundation for the Advancement of Teaching noted that the issue of whether law was then a profession or a trade was very much alive.²⁰³ While engaged in this conflict, the legal field lagged behind other fields in professionalizing. For example, in medicine at that time, a physician would earn a doctor of medicine degree (M.D.), which would provide evidence of medical training.²⁰⁴ In law, however, an attorney would not necessarily even earn a bachelor of laws degree (LL.B.), the degree of the day; often passing a bar examination was the only requirement.²⁰⁵ The credentials were not the same.

Rhetoric provided one way to improve the status of the legal field, and so Langdell, Ames, and their allies argued for a professor-as-scholar model that met the standards of university membership. In addition to the dimension of full-time devotion to the job, such a persona included teaching, research, and service dimensions.²⁰⁶ At that time in the United States, higher education, in drawing inspiration from contemporary European universities, was moving away from the idea of the liberal arts college and toward the idea of the university.²⁰⁷ Consequently, the pro-scholar lawyers developed a persona suitable for the university, which was the gateway to professional status for the legal field. Indeed, Langdell, Ames, and their allies even successfully predicted the future because the scholar model of the law professor continues to prosper in the U.S. university of the present day.²⁰⁸ As in fields throughout the university, the current full-time model in law includes “teaching, writing, and service.”²⁰⁹

At a theoretical level, this discussion of how lawyers like Langdell and Ames employed rhetoric between 1870 and 1920 to construct a persona appropriate for the law professor situated within the university has illustrated the benefits of addressing the first persona from a slightly different angle. While prior communication research had focused on the performance of a pre-existing first persona like that of a prophet, the current study has illustrated in detail how communicators can fill volumes in the act of rhetorically

Discussion, *The Ultimate Function of the Teacher of Law*, 3 AM. L. SCH. REV. 8, 9 (1911) (noting that law teaching was a profession, although a new one).

203. Carnegie Found. for the Advancement of Teaching, *The Study of Legal Education*, 3 AM. L. SCH. REV. 450, 450 (1914).

204. *Id.*

205. *Id.*

206. Vance, *supra* note 120, at 7.

207. See VEYSEY, *supra* note 10, at 1-10.

208. See Pedrioli, *supra* note 28, at 725.

209. Douglas Dale McFarland, Jr., *Self-Images of Law Professors: Rethinking Legal Education* 222 (July 1983) (unpublished Ph.D. dissertation, University of Minnesota) (on file with Wilson Library, University of Minnesota).

constructing a new persona. This distinction is one between the first persona performed (FPP) and the first persona constructed (FPC). The theoretical distinction allows critics to focus more on either the performance or the construction of first personae, although performance and construction are not mutually exclusive. For instance, once lawyers have constructed a law professor persona, conforming law faculty members would perform some version of that persona. A focus on the FPC would be useful in studying rhetoric in areas outside of legal education, including legal practice and politics.

In 1900, Ames declared, "I have the faith to believe that at no distant day there will be at each of the leading university law schools, a body of law professors of distinguished ability, of national and international influence."²¹⁰ The professors would be "men teaching in the grand manner, and adding lustre by their writings to the University and to the legal profession."²¹¹ Eventually, Ames would get his way. As the university law school began to gain control of a major portion of access to the legal field, the law professor would assume the persona of a scholar and ultimately become the gatekeeper to the profession.²¹² No longer would the law professor be someone with a trade.

210. Ames, *supra* note 119, at 146.

211. *Id.*

212. Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RES. J. 501, 547.